

March 21, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Michael J. Ravnitzky

Date of Filing: January 6, 2005

Case Number: TFA-0082

Michael J. Ravnitzky filed an Appeal from a determination that the Office of Classification and Information Control (OCIC) of the Department of Energy's Office of Security issued on December 10, 2004. In that determination, OCIC denied in part a request for information that the Appellant submitted on September 18, 2003, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. OCIC located three documents that were responsive to Mr. Ravnitzky's request, released one in its entirety, and withheld the other two in their entireties. OCIC determined that the withheld documents contained classified information and that removal of the classified information from those documents would result in the release of no meaningful information. This Appeal, if granted, would require the DOE to release those documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On September 18, 2003, Mr. Ravnitzky requested records at the Department of Energy (DOE) headquarters concerning Charles "Chuck" Hansen, primarily any government investigations into Mr. Hansen's activities or assessments of his work. The DOE Headquarters FOIA and Privacy Group responded to the request by requiring five offices to conduct searches for documents responsive to Mr. Ravnitzky's request. Only one office, OCIC, identified any responsive documents. OCIC informed Mr. Ravnitzky that it had located three potentially responsive documents and provided him with one of them in full. However, OCIC also withheld from release the other two responsive documents it had located. In its determination letter, OCIC explained that one withheld document contained information properly classified as National Security Information pursuant to Executive

Order 12958 and therefore warranted protection from disclosure under Exemption 1 of the FOIA. It also stated that the other withheld document contained information properly classified as Restricted Data pursuant to the Atomic Energy Act, 42 U.S.C. §§ 2161-2166, and therefore warranted protection from disclosure under Exemption 3. Finally, the determination letter stated that there were small amounts of unclassified material in each document, but it declined to release that material because it was “so inextricably intertwined with the classified material that removal of the classified information would result in the release of no meaningful information.”

The present Appeal seeks the disclosure of the withheld information described above. In his Appeal, Mr. Ravnitzky acknowledged that each of the withheld documents may contain classified information, but he contended that the unclassified portions, small though they may be, might in fact provide him with some meaningful information, and requested that those portions be released to him. In addition, he requested that the DOE reconsider its determination to withhold the title page of each of the withheld documents as classified information.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1); *see* 10 C.F.R. § 1004.10(b)(1).

Exemption 3 of the FOIA provides for withholding material “specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld.” 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 26 DOE ¶ 80,118 (1996).

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). Upon referral of this appeal from the Office of Hearings and Appeals, the Director reviewed the two documents for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

According to the Director, the DOE determined on review that, based on current DOE classification guidance, some of the material the DOE withheld from each of the documents may now be released. With respect to one of the documents, a one-page memorandum from

the Acting Chief Weapons Program Branch, Office of Classification, to the Deputy Director, Office of Classification, dated September 13, 1982, the information that the DOE continues to withhold concerns military plans, weapons systems, or operations; foreign government information; intelligence activities, intelligence sources or methods, or cryptology; foreign relations or foreign activities of the United States, including confidential sources; scientific, technological, or economic matters relating to the national security; and United States Government programs for safeguarding nuclear material or facilities. This information is currently classified as National Security Information (NSI) under sections 1.5(a), (b), (c), (d), (e), and (f) of Executive Order 12958, and is identified as "DOE b(1)" in the margin of a redacted version of this document, which will be provided to Mr. Ravnitzky under separate cover. Because NSI is defined as classified information in Executive Order 12958, it is exempt from mandatory disclosure under Exemption 1 of the FOIA.

With respect to the other document, a 16-page letter from Jack W. Rosengren to Robert T. Duff, dated August 27, 1982, the information that the DOE continues to withhold concerns nuclear weapons design that is currently classified as Restricted Data (RD) and is identified as "DOE b(3)" in the margin of a redacted version of this document, which will also be provided to Mr. Ravnitzky under separate cover. RD is a form of classified information the withholding of which is required under Atomic Energy Act of 1954, and is therefore exempt from mandatory disclosure under Exemption 3. Attached to the letter is a one-page routing slip from which a portion of the information has been withheld from disclosure under Exemption 1. The rationale for withholding the Exemption 1 information, and the method of identifying it, is set forth in the preceding paragraph.

The denying official for the DOE's withholdings is Mr. Marshall Combs, Director, Office of Security, Department of Energy.

Based on the Director's review, we have determined that Executive Order 12958 and the Atomic Energy Act require DOE to continue withholding portions of the two documents under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemptions 1 and 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the documents that the Director has now determined to be properly classified must be withheld from disclosure. Accordingly, the Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Michael J. Ravnitzky on January 6, 2005, Case No. TFA-0082, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) Newly redacted versions of the following two documents will be provided to Mr. Ravnitzky: a 16-page letter from Jack W. Rosengren to Robert T. Duff, dated August 27, 1982, with attached one-page routing slip, and a one-page memorandum from the Acting Chief Weapons Program Branch, Office of Classification, to the Deputy Director, Office of Classification, dated September 13, 1982.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 21, 2005